

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GARY A. CURREN,

Plaintiff, Cross-defendant and
Appellant,

v.

SAN DIEGO PAINTING,

Defendant, Cross-complainant and
Respondent,

SHAWN S. ITZHAKI,

Defendant and Respondent.

D052965

(Super. Ct. No. GIC879137)

APPEAL from a judgment of the Superior Court of San Diego County, David Oberholtzer, Judge. Judgment affirmed; motion for sanctions denied.

Gary Curren appeals from a judgment enjoining him from using the name "San Diego Painting" for his business, and refusing to enjoin respondent San Diego Painting from using this name in its business. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

In the late 1990's, Shawn Itzhaki owned a painting business called Royal Finishing, Inc. In 1997, Itzhaki recorded a fictitious business name statement for the business in the name of "San Diego Painting." The filing automatically expired five years later, and Itzhaki did not renew the filing. But Itzhaki continued to use the name "San Diego Painting" for contracting, advertising and other business-related purposes.

In about 1999, Curren began working for Itzhaki's San Diego Painting business as a painting estimator. The employment terminated in 2005. Shortly after, in March 2006, Curren filed a fictitious business name statement for the trade name "San Diego Painting," and began advertising for painting services using that name.

About one month later, Itzhaki filed a fictitious business statement for the name "San Diego Painting." In August 2006, Itzhaki changed the name on Royal Finishing's contractor's license to San Diego Painting. In January 2007, Royal Finishing changed its official corporate name (registered with the Secretary of State) to San Diego Painting.

Two weeks later, Curren filed a lawsuit against Itzhaki and San Diego Painting (collectively respondents) alleging that "[b]eginning on or about August 18, 2006, . . . Itzhaki wrongfully and unlawfully infringed on my company by knowingly, willfully, and intentionally changing [the] company business name . . . to 'San Diego Painting.'"¹ Curren asserted a cause of action under Business and Professions Code section 17200,

¹ Curren named as defendants: Itzhaki and "Royal Finishing Inc., dba San Diego Painting." Because Royal Finishing, Inc. had changed its corporate name to San Diego Painting several weeks before Curren filed the complaint, we use the "San Diego Painting" name in identifying this defendant.

alleging that Itzhaki's use of the name constituted an "unlawful, unfair, and fraudulent business practice"2 Curren sought to enjoin respondents from using the name, and requested compensatory and punitive damages.

San Diego Painting filed a cross-complaint, alleging it had continuously used the name "San Diego Painting" since 1997, the name is "widely and favorably known" by the public, and Curren's use of the name was an unfair business practice. San Diego Painting sought restitution and injunctive relief under section 17200.

Before trial, the parties waived their right to a jury and to a court reporter. After Curren presented his case, the court granted respondents' motion for judgment on Curren's complaint. Trial then continued on San Diego Painting's cross-complaint. After considering the evidence and argument, the court found San Diego Painting proved its unfair business practice claim and that it was entitled to injunctive relief.

In its statement of decision, the court explained that it applied the statutory presumption that Curren had the exclusive right to use the name "San Diego Painting" because he filed the fictitious business name after respondents' fictitious name filing had expired. (See § 14411.) But the court found San Diego Painting rebutted this presumption by producing evidence showing the "San Diego Painting" name had acquired a secondary meaning through the company's extensive and continuous business activities using this name. The court stated "[t]hose activities include[d] sales of over one million dollars in its first year of business, sales of over 1.6 million dollars in 2006, sales

² All further statutory references are to the Business and Professions Code unless otherwise specified.

of over 2 million dollars in its highest year, advertising expenditures of over \$54,000.00 in 2006 and advertising expenditures of over \$78,000.00 in 2005. There has also been testimony that defendant San Diego Painting participates regularly in trade shows. Finally, defendant San Diego Painting has had over 1000 repeat customers since January 1, 2004. That number of repeat customers is strong evidence of secondary meaning. [¶] . . . San Diego Painting's advertising and presentation of the company to the public emphasizes the name San Diego Painting."

Curren then moved for a new trial. In denying the motion, the court stated it had considered Curren's citation of numerous federal regulations and California statutes, but reiterated that the evidence supported a judgment in San Diego Painting's favor because its name had "acquired a secondary meaning within the relevant market of contract painting companies." The trial court also noted it had considered Curren's evidence showing the United States Patent and Trademark Office had refused to approve Curren's application for a trademark designation for the name "San Diego Painting," but stated the issue in this case pertained to whether San Diego Painting had the exclusive right to use the name under common law and the "secondary meaning" test.

In the final judgment, the court enjoined Curren from all current and future use of the "trade name San Diego Painting within the County of San Diego." The court stated the "injunction shall remain in effect . . . until and unless San Diego Painting abandons the trade name without taking any action to preserve its rights to the trade name, or until and unless it ceases doing business in San Diego County." The court "emphasize[d] that all references to 'San Diego Painting' are to that name only, no more and no less. No

reference is intended to any name other than the name consisting of those three words in that sequence." The court found no basis for an award of monetary damages, restitution, or attorney fees to either party.

Curren appeals.

DISCUSSION

I. *Standards Governing Appellate Review*

It is a fundamental tenet of appellate law that the lower court's judgment is presumed on appeal to be correct. As the party seeking reversal, it is the appellant's burden to provide an adequate record to overcome the presumption of correctness and show prejudicial error. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.)

The parties agreed not to have the trial recorded by a court reporter; thus there is no reporter's transcript of the trial. In the absence of a reporter's transcript of the trial, we cannot evaluate issues requiring a factual analysis and must presume "the trial court acted duly and regularly and received substantial evidence to support its findings." (*Stevens v. Stevens* (1954) 129 Cal.App.2d 19, 20; see *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657.)

To overcome the presumption of correctness, Curren must show legal error on the face of the appellate record, which consists of an appellant's appendix and numerous exhibits. We must make all reasonable inferences consistent with this record, and must affirm the judgment if any possible grounds exist for the trial court to have reached its factual conclusions. (See *Gee v. American Realty & Construction, Inc.* (2002) 99

Cal.App.4th 1412, 1416; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447-448; *National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521-522.) Any ambiguity in the record is resolved in favor of the judgment. (*Ibid.*)

II. Analysis

The trial court found San Diego Painting proved its claim that Curren committed an unfair business practice by using the name "San Diego Painting" for Curren's business.

Under California law, proof that a party is using the name of a second party to mislead consumers into believing they are dealing with the second party constitutes an unfair business practice that can be enjoined. (*Academy of Motion Picture Arts & Sciences v. Benson* (1940) 15 Cal.2d 685, 688-690; *Visser v. Macres* (1963) 214 Cal.App.2d 249, 253-257; *Industrial Photo Service v. Kelly* (1961) 198 Cal.App.2d 665, 667; see also *Sunset House Distributing Corp. v. Coffee Dan's, Inc.* (1966) 240 Cal.App.2d 748, 753.) To prevail, the second party must show only that the first party's use of the second party's name was likely to mislead the public, not that the public was actually misled. (*Ball v. American Trial Lawyers Assn.* (1971) 14 Cal.App.3d 289, 310.)

Without a reporter's transcript, we are required to presume that the evidence supported the court's factual conclusion that Curren's use of the name San Diego Painting was likely to mislead consumers into believing they were dealing with Itzhaki's San Diego Painting company. Thus, the court's grant of injunctive relief was proper.

On appeal, Curren raises several arguments to support his contention that the court's findings were erroneous as a matter of law. The arguments are without merit.

First, Curren contends the name "San Diego Painting" is a generic name that cannot be protected under federal trademark law. We need not reach this issue because San Diego Painting did not bring an action under federal trademark law, and the court did not base its conclusion on federal law.

The court instead based its judgment on state unfair competition law. (See § 17200.) California courts have long held that the user of a generic or descriptive name that has acquired a secondary meaning can obtain protection under unfair competition law, even if the name is not subject to exclusive appropriation under federal trademark law. (See *Academy of Motion Picture Arts, Etc. v. Benson*, *supra*, 15 Cal.2d at pp. 688-692; *California Western School of Law v. California Western University* (1981) 125 Cal.App.3d 1002, 1009 (*California Western*) ["geographical, generic, or descriptive words may not be exclusively appropriated for the purposes of a tradename, but if the name acquires a secondary meaning, equity will grant protection appropriate to the circumstances"]; *Colvig v. KSFO* (1964) 224 Cal.App.2d 357, 368 ["[w]hile names and designations which are not capable of becoming technical trademarks or tradenames are not regarded as property, the law of unfair competition protects them under the doctrine of secondary meaning"]; *Family Record Plan, Inc. v. Mitchell* (1959) 172 Cal.App.2d 235, 242-243 ["generic or descriptive words can acquire a secondary meaning"]; *Industrial Photo Service v. Kelly*, *supra*, 198 Cal.App.2d at p. 668 [under state law, a particular combination of "[g]eneric terms will be protected, once a secondary meaning has attached"].) Thus, even if a business name is generic, "a competitor's subsequent use of that name may give rise to an unfair competition claim if the competitor's failure

adequately to identify itself as distinct from the first organization causes confusion or a likelihood of confusion." (*Blinded Veterans Assn. v. Blinded American Veterans Foundation* (D.C. Cir. 1989) 872 F.2d 1035, 1043.)

Under these principles, a court may enjoin a party from using a "geographical, generic, or descriptive" name if a "secondary meaning" has attached to the name. (*California Western, supra*, 125 Cal.App.3d at p. 1009.) "A name or designation has a secondary meaning when it has been used so long or in such a way that the public has come to associate it with the person using it, and the criterion as to whether such secondary meaning exists depends on whether the public is likely to be deceived." (*Colvig v. KSFO, supra*, 224 Cal.App.2d at pp. 368-369; see *North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc.* (1979) 92 Cal.App.3d 98, 107.)

"[W]hether a name has acquired a secondary meaning is a question of fact." (*California Western, supra*, 125 Cal.App.3d at p. 1009; *North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc., supra*, 92 Cal.App.3d at p. 109; *Visser v. Macres, supra*, 214 Cal.App.2d at p. 254.) "Facts which are relevant in proving the existence of secondary meaning include the duration and continuity of the use of the name [citations]; the extent of advertising and promotion of the name and the sums spent therefor [citations]; sales figures showing the number of people who have purchased plaintiff's named product [or services] [citation]; and identification of plaintiff's and defendant's respective markets or marketing areas [citation]." (*North Carolina Dairy Foundation, supra*, 92 Cal.App.3d at pp. 109-110.)

The trial court made a specific finding that the name "San Diego Painting" had acquired a secondary meaning. In reaching this conclusion, the court cited several relevant factors, including the extensive amount of advertising and repeat business under the San Diego Painting name. Without a reporter's transcript, we presume substantial evidence supported the court's factual conclusion.

Curren argues the fact that San Diego Painting used various similar names during relevant times shows that the name "San Diego Painting" was not distinctive and thus could not have acquired a secondary meaning. The court rejected this argument, finding that although respondents sometimes used expanded versions of the name, the business "has come to be known as San Diego Painting." The court had a reasonable basis to reach this conclusion. In evaluating Curren's contentions, we are limited to reviewing the record for legal error, and may not reweigh the evidence.

Curren additionally contends the court's judgment must be reversed because it is inconsistent with California's fictitious business name statutes.

Section 14411 provides: "The filing of any fictitious business name statement by a person required to file such statement . . . shall establish a rebuttable presumption that the registrant has the exclusive right to use as a trade name the fictitious business name, as well as any confusingly similar trade name, in the county in which the statement is filed, if the registrant is the first to file such statement containing the fictitious business name in that county, and is actually engaged in a trade or business utilizing such fictitious business name or a confusingly similar name in that county. [¶] The rebuttable

presumption created by this section shall be one affecting the burden of producing evidence."

The court's statement of decision reflects that it applied this statutory presumption and shifted the burden to San Diego Painting to show that its name had acquired a secondary meaning. After considering the evidence, the court found that San Diego Painting rebutted the presumption with facts showing it had continued to use the name and that the name was well known in the relevant community. Based on the presumption of correctness and the specific facts discussed by the court in its statement of decision, we find no error in this conclusion.

Curren argues San Diego Painting's failure to immediately renew its fictitious business statement means Curren had the right to appropriate the name and San Diego Painting forever gave up all rights to use that name. This argument is not legally supported. Section 14418 states: "The filing of any fictitious business name statement . . . does not, of itself, authorize the use in this state of a fictitious business name in violation of the rights of another as established under this chapter, the federal law relating to trademarks . . . , or the common law, including rights in a trade name." In this case, San Diego Painting established its right to use the name under state statutes and common law by using the name first and showing the name had acquired a secondary meaning.

Curren additionally contends the court erred in failing to recognize the impact of Trial Exhibit No. 2, which appears to be a copy of an e-mail, dated January 9, 2007, from the United States Patent and Trademark Office, in which a patent office attorney denied

Curren's application to register the "San Diego Painting" name. Curren contends this denial means as a matter of law San Diego Painting has no protected right to use the name.

This argument is without merit. The denial of Curren's federal application reflected a preliminary finding that the name "San Diego Painting" was merely "geographically descriptive" and thus could not be protected under federal trademark law. As discussed above, federal trademark law is not controlling on the issue whether a party may be enjoined from using a misleading name under state unfair competition law. (See *Academy of Motion Picture Arts, Etc. v. Benson*, *supra*, 15 Cal.2d at pp. 688-692; *California Western*, *supra*, 125 Cal.App.3d at p. 1009; *Colvig v. KSFO*, *supra*, 224 Cal.App.2d at p. 369.) Additionally, San Diego Painting is not legally bound by the denial of Curren's application by the federal agency because San Diego Painting was not a party to the administrative proceeding, and thus had no opportunity to litigate the issue of whether its name had acquired a secondary meaning. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 848-849.)

In a related argument, Curren contends the court did not allow him to "present" or "elaborate on" the documents from the United States Patent and Trademark Office. Because we do not have a trial record, there is no support for Curren's contention. Further, the court's written ruling on Curren's new trial motion affirmatively establishes that the court did consider this evidence. In denying the motion, the court specifically discussed the action by the federal patent office, but properly found it was not dispositive in this action.

Curren also devotes large segments of his appellate brief to quote from the parties' pleadings and San Diego Painting's discovery responses. Curren's reliance on these pretrial documents is unhelpful. In evaluating a judgment after trial, we review the evidence introduced at trial, and not allegations in the parties' pleadings or information exchanged between the parties before trial.

We likewise reject Curren's contentions that the trial court did not "understand[]" the applicable law and improperly "undervalued" Curren's case. A trial judge "is presumed to know and follow the law." (*People v. Martin* (2005) 127 Cal.App.4th 970, 977.) There is nothing in the record showing the court misunderstood or misapplied the applicable law, or that it did not give its full attention to Curren's case. To the contrary, the court's written statement of decision and denial of the new trial motion reflect a proper understanding of applicable law. Curren's related argument that the court failed to provide him with sufficient time to present his case is also unsupported. The appellate record does not show the court did not permit Curren to fully present his case.

Curren contends San Diego Painting acted improperly in its contractor's license filings because of the various names used in the filings and the locations of its businesses. However, even assuming the truth of these assertions, there is no showing Curren had standing to raise these administrative violations as a basis for his own recovery or injunctive relief.

III. *Motion for Sanctions for Frivolous Appeal*

On appeal, respondents moved for sanctions, arguing that Curren's appeal was frivolous.

An appellate court may impose sanctions on a party for prosecuting a frivolous appeal. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276(a); *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) An appeal is frivolous "only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty, supra*, at p. 650.)

Although we agree that most reasonable attorneys would conclude this appeal has no merit, we exercise our discretion to decline to award sanctions. In reaching this conclusion, we note the complexity of tradename and trademark law, and that there is no evidence Curren brought the appeal for an improper purpose, i.e., it appears he subjectively believes that his claims are supported by the law. We nonetheless caution Curren that in the future he should carefully consider applicable legal principles before making the decision to prosecute an appeal. Although we recognize that Curren is not represented by counsel, appearing in propria persona does not exempt an appellant from complying with applicable law and established appellate rules. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

DISPOSITION

Judgment affirmed. Motion for sanctions on appeal denied. Appellant is to bear respondents' costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.